FILED
SEP 4 1979
MICHAEL ROBAK, JR., CLER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

No. 79-55

THE TENNESSEE COMMISSION OF HIGHER EDUCATION,

Petitioner,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ORIGINAL PLAINTIFFS, RITA SANDERS GEIER, PATRICK J. GILPIN, ERNEST TERRELL, HAROLD SWEATT, and PHILLIP SWEATT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

GEORGE E. BARRETT

BARRETT, LENAHAN,
KNIFFEN & RAY, P.C.
217 Second Avenue, North
Nashville, Tennessee 37201
(615) 244-2202

Attorney for the Original Plaintiffs/Respondents

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

AUTHORITIES CITED i

OPINIONS BELOW 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT OPPOSING WRIT OF CERTIORARI 4

I. The Court of Appeals Properly Concluded That the District Court Correctly Exercised Its Discretion in Ordering the Merger of TSU and UT-N To Remedy Tennessee's *De Jure* Constitutionally Violative Dual Education System 4

A. Tennessee has failed to fulfill its affirmative duty to desegregate public higher education 4

B. The merger order is within the equitable power of the District Court and is a remedy tailored to dismantle the constitutionally violative dual education system 6

II. A Writ of Certiorari Should Not Issue Because the Merger Remedy Devised and Affirmed by the Lower Courts Is Constitutionally Sound 8

A. Both lower courts have found Appellants to be maintaining a dual system of education violative of the United States Constitution 8

B. A long history of Supreme Court precedents to eliminate dual systems of education has standardized the issues at bar 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Aberdeen and Rockfish Ry. Co. v. SCRAP, 409 U.S. 1207 (1971) 6

Cases, continued: Page

Alabama State Teachers Association v. Alabama Public Schools and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) 10

Brown v. Board of Education, 347 U.S. 483 (1954) 5

Dayton Board of Education v. Bunkerman, 433 U.S. 406 (1977) 7

Geier v. Blanton, 427 F.Supp. 644 (M.D. Tenn. 1977) 2, 3, 11

Geier v. Dunn, 337 F.Supp. 573 (M.D. Tenn. 1972) ... 2, 3, 7

Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979) 1, 3, 9, 10, 11

Green v. County School Board, 391 U.S. 430 (1968) 8, 10

Jefferson Parish School Board v. Dandridge, 404 U.S. 1219 (1971) 5, 6

Keyes v. School District No. 1, 413 U.S. 189 (1973) 5

McLaughlin v. Florida, 379 U.S. 184 (1904) 11

Milliken v. Bradley, 418 U.S. 717 (1974) 11

Milliken v. Bradley, 433 U.S. 267 (1977) 7

NAACP v. Lansing Board of Education, 559 F.2d 1042, 1045 (6th Cir. 1977), *cert. den.* 434 U.S. 997 (1977) 5

Norris v. State Counsel of Higher Education for Virginia, 327 F.Supp. 1368 (E.D. Va.), *aff'd per curiam sub nom. Board of Visitors of the College of William & Mary v. Norris*, 404 U.S. 907 (1971) 10

Sanders v. Ellington, 288 F.Supp. 937 (M.D. Tenn. 1968) 2, 3, 7

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 6, 7

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 7

Other Authorities: Page

Fourteenth Amendment of the Constitution of the United States 2

United States Department of HEW, *Revised Criteria Specifying Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6658 (Feb. 15, 1978) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

No. 79-55

THE TENNESSEE COMMISSION OF HIGHER EDUCATION,

Petitioner,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ORIGINAL PLAINTIFFS, RITA SANDERS GEIER, PATRICK J. GILPIN, ERNEST TERRELL, HAROLD SWEATT, and PHILLIP SWEATT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported as *Geier v. University of Tennessee,*

597 F.2d 1056 (6th Cir. 1979). The opinions of the District Court in this case are reported as *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968); *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972); and *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that the District Court correctly exercised its discretion in ordering the merger of TSU and UT-N to remedy Tennessee's *de jure* constitutionally violative dual education system.

2. Whether a writ of certiorari should not issue because the merger remedy devised and affirmed by the lower courts is constitutionally sound.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action to desegregate the dual system of public higher education maintained by the State of Tennessee

was filed in the United States District Court for the Middle District of Tennessee in 1968. The issue in contention then, as now, is the remedy required by the Fourteenth Amendment to eliminate the dual system of formerly all-black Tennessee State University (hereinafter TSU) maintained alongside the formerly all-white, now predominately white, University of Tennessee at Nashville (hereinafter UT-N).

Litigation has been protracted for eleven years. The District Court found in 1968 that Tennessee had failed to eliminate the state-wide *de jure* system of racial segregation in higher education. *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). Spanning a decade, the District Court repeatedly ordered the Appellants to desegregate the public education system. See *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972); *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977). Following 20 days of trial, the Court concluded in 1977 that, because the Appellants' approach to dismantling the system had neither worked nor contained any prospect of working, "the only reasonable alternative is the merger of TSU and UT-N into a single institution" by July 1980. Subsequent thereto, Appellants were three times denied stays of the District Court's merger orders.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling. *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979). Judge Engel's limited dissent concurred in all the majority's holdings except the affirmance of the remedial order to merge. Appellants were denied a stay by the Court of Appeals for the Sixth Circuit before and after its ruling.

This matter comes before this Court upon Appellants' petitions for a writ of certiorari to the Court of Appeals

for the Sixth Circuit following this Court's denial to stay the mandate of the District Court and judgment of the United States Court of Appeals for the Sixth Circuit rendered April 13, 1979. This brief is in opposition to both the petition for a writ of certiorari filed in *University of Tennessee v. Rita Sanders Geier, et al.*, No. 79-10 (July 3, 1979), and the petition for a writ of certiorari filed in *Tennessee Higher Education Commission v. Rita Sanders Geier, et al.*, No. 79-55 (July 13, 1979).

ARGUMENT OPPOSING WRIT OF CERTIORARI

I.

THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION IN ORDERING THE MERGER OF TSU AND UT-N TO REMEDY TENNESSEE'S *DE JURE* CONSTITUTIONALLY VIOLATIVE DUAL EDUCATION SYSTEM.

A.

Tennessee has failed to fulfill its affirmative duty to desegregate public higher education.

Tennessee has an affirmative duty to dismantle its statutory dual system. The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy has been to dismantle the dual school systems.

> Where a dual education system was authorized by state law at the time of *Brown I*, finding state action presents no serious problem. The state automatically assumes an affirmative duty "to effectuate a transition to a racially non-discriminatory school system" . . . by eliminating "all vestiges of state-imposed segregation." *NAACP v. Lansing Board of Eucation*, 559 F.2d 1042, 1045 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977) (citations omitted).

Defendants' efforts to impede the orderly dismantling of Tennessee's dual educational system have permitted UT-N to siphon off white students who normally would have desegregated TSU. Contrary to Defendants' claim that this is a case of *de facto* segregation, the case exhibits a classic *indicium* of *de jure* segregation—a state-imposed statutory segregation consistently maintained by the actions of state officials.

For over ten years the University of Tennessee has been unable to demonstrate extraordinary reasons to justify the issuance of a writ of certiorari. As the Court held in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), where a school board was found to have deliberately segregated the school system with cumulative violations of the equal protection clause, school authorities have an affirmative duty to effectuate a transition to a racially non-discriminatory school system. The lower courts have consistently found the *de jure* segregation of higher education in Tennessee to be a violation of the United States Constitution. Granting certiorari, then, would only perpetuate the unconstitutional dual system of education. The citizens of Tennessee must no longer have to endure such discrimination. The "devastating, often irreparable, injury to those children who experience segregation and isolation was noted (24) years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954)." *Jefferson Parish School Board v. Dandridge, supra*, 404 U.S. 1219, 1220 (1971). The irreparable injury of discrimination is equally conclusive

on black college students attending TSU. Appellants' arguments opposing merger are insufficiently substantive to warrant the grant of certiorari.

> The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult. *Jefferson Parish School Board v. Dandridge, supra,* 404 U.S. 1219, 1220 (1971).

After protracted litigation for over ten years, the University of Tennessee and the Tennessee Higher Education Commission must obey the constitutional mandate to desegregate. The dual system of Tennessee public higher education must be dismantled in the public interest.

B.

The merger order is within the equitable power of the District Court and is a remedy tailored to dismantle the constitutionally violative dual education system.

The District Court exercised its inherent powers to fashion an equitable remedy for eliminating *de jure* segregation in Tennessee public higher education. The scope of such "equitable powers to remedy past wrongs is broad," *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1 (1971), and its ruling is entitled to substantial deference. *Aberdeen and Rockfish Ry. Co. v. SCRAP,* 409 U.S. 1207 (1972). Appellants twice suffered adverse lower court rulings. Appellants' failure to substantiate their claim clearly shows that a presumption in favor of the lower courts' rulings is warranted. Thus, the remedy devised and affirmed by the lower courts is entitled to substantial deference.

> [A] school desegregation case does not differ fundamentally from other cases involving the forming of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 15-16.

The merger order was a necessary and appropriate decree to put an end to the racial discrimination statutorily practiced in Tennessee public higher education. School desegregation remedies must be designed to redress the segregative effect of the constitutional violations. *Dayton Board of Education v. Bunkerman,* 433 U.S. 406 (1977). As in *Milliken v. Bradley,* 433 U.S. 267 (1977), the remedy here does not "exceed" the violation since the remedy is tailored to cure the "condition that offends the constitution." The merger of TSU and UT-N was ordered to eliminate all vestiges of state-imposed segregation becase they violate constitutional guarantees of Equal Protection. Since it is possible to identify a "white school" or a "negro school," a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown. *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 19. See *Wright v. Council of City of Emporia,* 407 U.S. 451, 465 (1972). Despite minimal improvements in integrating TSU and UT-N, Petitioners have failed to rebut a *prima facie* case of racial discrimination.

A remedy greater than the court-order desegregation plans in *Sanders v. Ellington,* 288 F.Supp. 937 (M.D. Tenn. 1968), and *Geier v. Dunn,* 337 F.Supp. 573 (M.D. Tenn. 1972), is required to satisfy the constitutional mandate to create a unitary, non-racial public

higher education system in Tennessee. As the Court found in *Green v. County School Board*, 391 U.S. 430 (1968), a plan utilizing freedom of choice to desegregate a dual, racially segregated school system is not an end *per se*, but is only a means to a constitutional mandated end—the abolition of all vestiges of segregation. The *Green* court concluded that the plan is acceptable if effective, but if insufficient to eliminate segregative effects, other means must be used to attain this end. The merger order is a remedy designed to eliminate the discrimination inherent in Tennessee's statutorily created dual system of education.

II.

A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THE MERGER REMEDY DEVISED AND AFFIRMED BY THE LOWER COURTS IS CONSTITUTIONALLY SOUND.

A.

Both lower courts have found Appellants to be maintaining a dual system of education violative of the United States Constitution.

Both the District Court and the Court of Appeals after careful consideration concluded that the unconstitutional segregation maintained in Tennessee's higher education must be remedied by a merger of UT-N and TSU. Appellants were obliged to dismantle the dual school system by setting up joint, cooperative, and exclusive programs between TSU and UT-N. Appellants failed to meet their affirmative duty, thereby requiring the District Court, after repeated admonishments, to fashion its own remedy. The Court of Appeals substantiated all the District Court's findings of fact and conclusions of law:

> (1) The district court did not err in holding that the defendants have an affirmative duty to dismantle the dual system of public higher education which heretofore existed in Tennessee; (2) the district court did not err in holding that the open admissions policy instituted in 1960 failed to dismantle the dual system; (3) the district court did not err in holding that the defendants are required to take affirmative steps to complete dismantling the dual system; (4) the district court did not err in finding that the existence of an expanding UT-N in close proximity to TSU has impeded the progress of desegregating TSU and of dismantling the dual system; (5) the district court did not exceed its equitable power or impose an inappropriate remedy in ordering merger of UT-N and TSU under the governing authority of SBR [State Board of Regents]. *Geier v. University of Tennessee*, 497 F.2d 1056, 1071 (1979).

Pursuant to Rule 19(1)(b), Rules of the Supreme Court of the United States, this Court should pay particular attention to the Court of Appeals' appraisal of the central issue upon which this petition for a writ of certiorari pivots:

> The Fourteenth Amendment provides that *no state* "shall deprive any person within its jurisdiction the equal protection of the laws." [T]he State . . . required for many years that black persons pursuing an education be isolated from white persons engaged in the same endeavor. The colleges and universities under the jurisdiction of the UT Board as well as those under SBR were operated as part of a dual system. Both boards and all the public institutions are instrumentalities of the State. After the doors of all institutions were opened to all qualified applicants without regard to race, the effects of the

previous segregation lingered. TSU remained an almost totally black university in student body, faculty and administration. Its efforts to desegregate were directly affected by competition from the expanding UT-N. Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the court-ordered plan for dismantling that system. *Geier v. University of Tennessee*, 497 F.2d 1056, 1070-71 (1979).

B.

A long history of Supreme Court precedents to eliminate dual systems of education has standardized the issues at bar.

The University of Tennessee wrongly contends that the issues in the instant case are unique. This futile attempt to obtain a writ of certiorari must be rejected in light of the case law on *de jure* segregation. The Supreme Court has long held that the Fourteenth Amendment forbids racial discrimination in higher education. *Norris v. State Council of Higher Education for Virginia*, 327 F.Supp. 1368 (E.D. Va.), *aff'd per curiam sub nom. Board of Visitors of the College of William & Mary in Virginia v. Norris*, 404 U.S. 907 (1971) (citations omitted). In *Norris* the District Court enjoined the expansion of a predominantly white college because the state had an affirmative duty to convert the dual system of higher education to a unitary system eliminating racial discrimination. See *Green v. County School Board*, 391 U.S. 430 (1968); *Alabama State Teachers Association v. Alabama Public School and College Authority*, 389 F.Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393

U.S. 400 (1969). *See also* the United States Department of HEW's approval of the merger remedy for desegregating public education, U.S. Dept. of HEW, *Revised Criteria Specifying Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6658 (Feb. 15, 1978). The contention that *de jure* segregation practiced in Tennessee is somehow different from segregation elsewhere is without merit.

Contrary to Appellants' assertion, the Court of Appeals' holding is apposite to *Milliken v. Bradley*, 418 U.S. 717 (1974). In *Milliken*, the Supreme Court held that the District Court's remedy to eliminate *de jure* segregation was permissible where the record established unconstitutional racial discrimination. Thus, the remedy in the instant case need not be limited since the record provides sufficient evidence that the remedial order was justified and applicable to Appellants.

Pursuant to Rule 19, Rules of the Supreme Court of the United States, Petitioners are unable to provide even one special and important reason for the Supreme Court to grant certiorari. There exists no conflict between the decision of the lower courts and previous decisions on the same issue by the Supreme Court. Furthermore, the affirmation of the Sixth Circuit Court of Appeals is not in direct conflict with decisions of other Courts of Appeals. Nor is there any conflict between this Sixth Circuit decision and any other Sixth Circuit decision. Finally, earlier holdings of *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977), *aff'd sub nom. Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), conform to all Supreme Court decisions on this issue.

McLaughlin v. Florida, 379 U.S. 184 (1904), a case relied upon by Petitioners, declares that the central

purpose of the Fourteenth Amendment of the United States Constitution was to eliminate racial discrimination emanating from official sources in the States. The order to merge UT-N into TSU is a remedy designed to achieve this end.

CONCLUSION

For the above reasons, the Petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

BARRETT, LENAHAN,
KNIFFEN & RAY, P.C.

By: _____
GEORGE E. BARRETT
217 Second Avenue, North
Nashville, Tennessee 37201
Attorney for the
Original Plaintiffs